Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PAUL SPARKS - PETITIONER

VS.

MATTOX & MATTOX - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

This case involves an attorney client relationship where the attorney was found to have imposed duress and overreaching in procuring a promissory note and mortgage from the client. Although the Indiana State Courts declared the attorney conduct wrongful, they refused to allow the client to pursue a counterclaim for damages under a viable theory of recovery according to state law.

Whether the Indiana State Courts denied Mr. Paul Sparks his fundamental rights of due process and access to the courts in the dismissal of his counterclaim against the Mattox law firm based upon duress and overreaching after declaring that the Mattox law firm engaged in wrongful conduct, specifically duress and overreaching, in procuring a promissory note and mortgage to secure an attorney fee from Mr. Sparks.

LIST OF PARTIES

__X__ All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion on the merits of the Indiana Court of Appeals denying Mr. Sparks appeal appears at appendix A to this petition and is unpublished.

The opinion on the merits of the Indiana Circuit Court dismissing Mr. Spark's counter-claim appears at appendix B to this petition and is unpublished.

The decision of the Indiana Supreme Court, which denied the petition to transfer, appears at appendix C to this petition and is unpublished.

The opinion denying the petition for rehearing of the Indiana Court of Appeals appears at appendix D to this petition.

JURISDICTION

The date on which the Indiana Court of Appeals ruled upon my case was on January 27, 1997. A copy of that decision appears at appendix A.

The opinion on the merits of the Indiana Circuit Court dismissing Mr. Spark's counter-claim was dated January 23, 1997 and appears at appendix B to this petition and is unpublished.

A motion to transfer the case to the Indiana Supreme Court was thereafter denied on September 11, 1998, and a copy of the order denying the motion to transfer appears at appendix C.

A timely petition for rehearing before the Indiana Court of Appeals was thereafter denied on April 14, 1998, and a copy of the order denying the rehearing appears at appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment Right to "petition the government for a redress of grievances".

Fourteenth Amendment's guarantee that no state shall deprive any person of property without due process of law and equal protection under the law.

Right of access under the privileges and immunities secured under article IV of the constitution.

STATEMENT OF THE CASE

This case involves an attorney client relationship where the attorney was found to have imposed duress and overreaching in procuring a promissory note and mortgage from the client. Although the Indiana State Courts declared the attorney conduct wrongful, they refused to allow the client to pursue a counterclaim for damages under a viable theory of recovery according to state law. This is not only misapplication of a properly stated rule of law but conflicts with the decision of other state courts of last resort and the decisions of the various federal court of appeals.

Paul Sparks originally employed the law firm of Mattox & Mattox to represent him in a criminal case in Clark County, Indiana. Mr. Sparks paid the law firm $5,000.00 as an attorney fee. Mr. Sparks was in jail on bond. The case proceeded to a pretrial approximately three weeks before a trial date. After the pretrial hearing, the Mattox firm demanded an additional $25,000.00 dollar fee. Mr. Sparks objected to any additional fee and refused to pay. Mr. Sparks expressed he had no additional funds. The Mattox firm then demanded Mr. Sparks sign a promissory note and mortgage on his residence. Again Mr. Sparks refused. The night before trial and upon the threat to withdraw as counsel, the Mattox firm coerced Mr. Sparks to sign the promissory note and mortgage. The next morning, the Mattox firm convinced Mr. Sparks to plead guilty to a misdemeanor and Mr. Sparks was released from jail. While incarcerated, Mr. Sparks was diagnosed with having a loner profile and was treated for depression with medication.

The Mattox firm then filed a foreclosure action to collect the promissory note and mortgage. Mr. Sparks filed an answer denying any amount being owed and filed a counterclaim asserting that since the attorneys engaged in

duress and overreaching in obtaining the promissory note and mortgage, then the Mattox firm was liable for damages. The trial court dismissed the counterclaim pursuant to a motion for partial summary judgment filed by Mattox & Mattox. The trial judge denied a motion to reconsider the dismissal of the counterclaim.

Upon trial of the case, the court declared that the Mattox law firm engaged in conduct which subjected Mr. Sparks to duress and overreaching. The note and mortgage were held invalid. The court still awarded the Mattox judgment upon the theory of Quantum Meruit. Mr. Sparks appealed. The Indiana Court of Appeals upheld the trial court's award of attorney fees based upon quantum merit and the dismissal of the counterclaim.

The court of appeals should have allowed Mr. Sparks to proceed with a counterclaim. Although Mr. Sparks respectfully disagreed with the decision of the court to dismiss the counterclaim prior to trial, once the court declared that the Mattox firm subjected the client to duress and overreaching, Mr. Sparks then had a property interest in a claim against the Mattox firm. The decision of the court of appeals stated,

> Even assuming that the trial court erred by dismissing Spark's counterclaim, we fail to see how he was prejudiced. Although Sparks was not able to present a separate claim, he was permitted to defend against Mattox's attempt to enforce the agreement and mortgage on the grounds of duress. Considering that Sparks was given an opportunity to present evidence of duress and that the trial court set aside the written agreement, promissory note and mortgage on this basis, we cannot

> conclude that he was prejudiced by the dismissal of his counterclaim. Thus, we find no error. Decision of the Indiana Court of Appeals appendix C, page 31.

Upon the trial court declaration that the Mattox firm engaged in wrongful conduct and the Indiana Court of Appeals ruling that the failure to allow Mr. Sparks to present a counterclaim based upon the same elements, a violation of state and federal law occurred. Mr. Sparks had a declaration of the court which established his right to proceed with a claim against the Mattox firm under established state law and the right to proceed with the claim is protected under the rights commonly referred to as access to the courts.

Upon receipt of the ruling of the Indiana Court of Appeals, Mr. Sparks filed a petition for rehearing asserting that the failure to allow Mr. Sparks to proceed violated his rights under the theory of access to the courts. The petition for rehearing before the Indiana Court of Appeals was denied. A petition to transfer the case to the Indiana Supreme Court was also denied. Mr. Paul Sparks now petitions the United States Supreme Court for a Writ of Certiorari.

BEST AVAILA

REASONS FOR GRANTING THE PETITION

The Indiana State Courts denied Mr. Paul Sparks fundamental right of due process and right of access to the courts in dismissal of his counterclaim at the same time declaring that the Mattox law firm engaged in wrongful conduct specifically duress and overreaching in procuring the promissory note and mortgage to secure an attorney fee.

The Fourteenth Amendment to the United States Constitution specifically guarantees that

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law....

The First Amendment to the Constitution also guarantees the right of the people to "petition the government for a redress of grievances". These guarantees are commonly referred to as the right of access to the courts. The touchstone is meaningful access not total or unlimited access. **Green v. Warden, United States Penitentiary**, 699 F.2d 364 (7th Cir.), Cert. denied, 461 U.W. 960, 103 S. Ct. 2436, 77 L. Ed. 2d 1321 (1983). Also see **Graham v. National Collegiate Athletic Ass'n**, 804 F.2d 953 (6th Cir. 1986). The Sixth Circuit Court of Appeals cited the following federal cases which support the right of access to the courts . **Chambers v. Baltimore & O.R.R.**, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907) (right of access is a privilege and immunity secured under article IV of the constitution and the Fourteenth Amendment): **California Motor Transport Co. v. Trucking Unlimited**, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972) (right of access is one aspect of First

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Amendment right of petition); **Wolff v. McDonnell**, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986 41 L.Ed.2d 935 (1974) (right of access is founded in the Due Process Clause). A number of federa circuit courts have likewise found the right o access to the courts to be protected by the First Amendment. **See, e.g. Harrison v. Springdale Water & Sewer Commission**, 780 F.2d 1422, 1427 (8th Cir. 1986); **Wilson v. Thompson**, 593 F.2d 1375, 1387 (5th Cir. 1979); **McCray v. Maryland**, 456 F.2d 1, 6 (4th Cir. 1972); **Harris v. Pate**, 440 F.2d 315, 317 (7th cir. 1971). **See Harrison**, 780 F.2d at 1428; **Ryland v. Shapiro**, 708 F.2d 967,972 (5th Cir. 1983).

In this action, the Indiana State Courts found the elements of a cause of action in declaring the attorney engaged in wrongful conduct but denied Mr. Sparks the ability to proceed on his counterclaim.

Generally under Indiana law, when an attorney and client enter into a contract of employment for professional services, prior to commencement of representation, they are presumed to be dealing at arms length. No confidential relationship exists. Such a contract in regards to compensation is valid if the client is fully informed. A contract entered into under such circumstances cannot be repudiated merely because of a subsequent confidential relationship, nor merely upon the theory that the reasonable worth of the services is less than the stipulated amount. **Indiana Encyclopedia** Section 93, page 465 and **Potter vs. Daily**, 40 N.E.2d 339, 220 IND. 43 (1942).

On the other hand, all transactions between an attorney and his client entered into during their confidential relationship are closely scrutinized and are regarded with suspicion. **Briggs v. Clinton County Bank & Trust Co. of Frankfort, Ind.**, 452 N.E.2d 989 (Ind.App. 2 Dist. 1983).

A contract entered into between attorney and client, in regards to the attorney's compensation, during representation or existence of a confidential relationship, is presumptively fraudulent. The burden shifts and is upon the attorney to show that it was fair. **Indiana Encyclopedia** Section 93, page 466 and **French vs. Cunningham**, 49 N.E. 797, 149 IND. 632 (1898).

An attorney's dealings with his client must be with the utmost honesty and good faith, **CJS, Attorney & Client**, Section 127. Transactions between the attorney and client are presumed to be fraudulent so that the attorney has the burdened of proving fairness and honesty thereof, **Olds vs Hitzemann**, 32 N.E.2d 35, 220 IND. 300(1942). The client's right to avoid the transaction may be conditioned upon the client's restoration of the status quo or payment of fees and disbursements of the attorney, **Olds**, Supra. Generally, an attorney has the burden of negating the presumption of undue influence with the respect to conveying an interest in the client's property to said attorney, **Blasche vs. Himelick**, 210 N.E.2d 378, rehearing denied 211 N.E.2d 197, 140 IND. APP. 255(1965), **Castle vs. Kroeger**, 39 N.E.2d 459, 111 IND. APP. 43(1942).

A client has the right to avoid an unfair or fraudulent transaction of or with his property to the attorney by either an affirmative suit in equity to set it aside or by assertion of fraud or confidential relationship in defense to attorney's attempt to enforce his rights under transaction. **Olds**, supra. In a more recent Indiana case, the court held that a client may recover compensatory and punitive damages for an attorney's wrongful conduct. **Bell v. Clark**, 670 N.E.2d (Ind. 1996)

Regarding the Mattox firm's claim under quantum merit, in the event that there is no agreement between the attorney and client, then the attorney may be entitled to recover attorney

fees under the theory of quantum meruit. Quantum meruit is an equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefore. **Black's Law Dictionary, Fifth Edition, pg. 1119.** The remedy of quantum meruit is a breach of contract theory. It is available to the **innocent** (emphasis added) party to recover the value of services performed under the contract. **Indianapolis v. Twin Lakes Enterprises**, 568 N.E.2d 1073 (Ind.App. 1 Dist. 1991).

The Court in **Briggs, supra**, specifically held;

> In order to gain relief in equity, one must have clean hands.
>
> In view of finding of undue influence exercised by attorney over client, attorney did not have clean hands and was not entitled to equitable relief in the nature of quantum meruit.
>
> Quasi-contract is founded in equity; it is an obligation created by law for reasons of justice.
> In order to recover in quasi-contract, one must demonstrate that a benefit was rendered another upon his implied request and under circumstances in which equity demands compensation to prevent unjust enrichment.
>
> Person may be prevented from obtaining compensation on theory of quasi-contract if, in connection with the transaction upon which the claim is based, his conduct has been wrongful.

In **Briggs, supra**, the court held that attorney failed to overcome presumption of undue influence in connection with contract for legal service when client had uncontrolled diabetes and arteriosclerosis and was showing signs of senility at the time that she signed documents. Furthermore, in view that the attorney exercised undue influence over the client, the principal of quasi-contract could not be sustained.

An attorney can recover for services rendered, under the theory of quantum meruit, unless he is involved in wrongful conduct. **French v Cunningham et al.** 149 Ind. 632 (1898).

In other jurisdictions courts have denied an attorneys fee based on quantum meruit where the attorney subjected a client to coercion, duress, and overreaching. The court in **Jackson vs. Griffith**, Fla.App., 421 So.2d 677 (1982), stated that an attorney who engages in wrongful conduct sufficient to void an attorney fee agreement in law, should not be allowed to profit from his blatantly unprofessional conduct under the equitable doctrine of quantum meruit. In **Dailey vs. Testone**, 435 P.2d.24 (1967), the court stated that when an attorney is guilty of fraudulent acts or gross misconduct in violation of statute or against public policy, a client may have complete defense to attorney's action for fees. A California court decided that "Fraud or unfairness on the part of an attorney will prevent him from recovering for services rendered, as will acts in violation or excess of authority, and acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of his duties." **Terry v. Bender**, 300 P.2d 119 (1956).

"An attorney who is guilty of actual fraud or bad faith toward a client, or who seeks to secure his or her personal advantage to the prejudice of the client, is not entitled to any

compensation for his or her services." 7 Am Jur 2d, sec. 279, pg. 293. A contract to pay a fee made in the courtroom on the lawyer's threat of withdrawal as the trial is about to begin is not enforceable. Fitzpatrick v. State Bar, 20 Cal. 3d 73, 141 Cal.Rptr. 169, 569 P.2d 763 (1977).

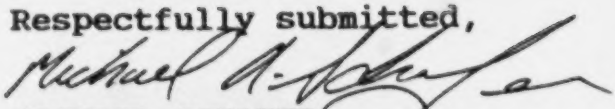
The right to pursue a counterclaim for compensatory and punitive damages based upon a recognized theory of recovery against an attorney who was found to have subjected his client to duress and overreaching is fundamental under our constitution. Although the trial court dismissed the counterclaim before the trial of the case, and the court declared the attorney engaged in wrongful conduct after the trial, the Indiana State Courts refused to allow Mr. Sparks to present the counterclaim for attorney misconduct in violation of Mr. Spark's First Amendment Right to "petition the government for a redress of grievances", the Fourteenth Amendment's guarantee that no state shall deprive any person of property without due process of law and equal protection under the law, and his right of access under the privileges and immunities secured under Article IV of the Constitution.

Mr. Sparks is not arguing that he was not allowed to file his counterclaim, but was denied the right to proceed with the claim which also was the foundation of the defense to the Mattox firm's claim for attorney fees under the note, mortgage and theory of quantum meruit. Access to the courts requires meaningful access.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Pursuant to Ind. Appellate Rule 15(A)(3), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

PAUL SPARKS, Appellant-Defendant	)	
vs.	)	No. 10A01-9703 -CV-77
MATTOX & MATTOX and NINA S. MILLER, Ph.D. Appellees-Plaintiff	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Donahue, Judge
Cause No. 10C01-9309-CR-473

February 6, 1998

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Paul Sparks appeals the trial court's judgment awarding appellee-plaintiff Mattox & Mattox (Mattox) approximately $16,500 for legal services it provided to Sparks.

> Footnote 1 - Sparks does not appeal the trial court's judgment in favor of Nina Miller.

Specifically, Sparks contends that the trial court improperly dismissed his counterclaim for duress and misrepresentation against Mattox and erroneously concluded that Mattox was entitled to recover fees under a theory of quantum meruit. On cross-appeal, Mattox argues that the trial court erroneously concluded that a promissory note and mortgage executed by Sparks to secure payment of the fees was void due to duress. Additionally, Mattox argues that the trial court erred by concluding that the firm did not have standing to challenge the validity of another mortgage executed by Sparks and that the other mortgage had priority over the firm's claim for legal fees.

FACTS

> Footnote 2 - At the outset, we note that Sparks' counsel failed to follow the appellate rules in several respects. In particular, we note that, in violation of Ind.Appellate Rule 7.2, counsel failed to provide marginal notations in the transcript indicating the name of the witness testifying or whether the examination was direct, cross or recross. More importantly, counsel failed to provide a single citation to the record in his brief, as required by App.R. 8.3. Considering that the record of the proceedings is in

> excess of 2,300 pages. Counsel's failure to comply with the rules has seriously hampered our review. Although flagrant violations of the appellate rules can result in waiver on appeal, we may exercise our discretion to reach the merits of the case when the violations are comparatively minor. Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995), trans. denied. Notwithstanding Mattox's urging to the contrary, we exercise such discretion here. However, we admonish counsel to review the appellate rules before filing another appeal before this court.

On May 18, 1992, Sparks was charged with Child Molesting,

> Footnote 3 - IND. CODE sec. 35-42-4-3. In 1994, an amendment to this section eliminated the class D felony designation.

a Class D felony. As a result, on July 1, 1992 Sparks contacted Richard Mattox and asked his firm to represent him in the pending criminal proceedings. After Richard agreed, Sparks paid the firm $5,000. However, the parties did not reduce the terms of the agreement to writing.

Shortly thereafter, Mattox discovered that Sparks also had another unrelated charge pending against him. Further, during a pre-trial conference on August 12, 1992, Mattox learned that the prosecution planned on introducing evidence of three collateral incidents of sexual misconduct by Sparks and that a federal investigation was being conducted against Sparks for illegal wire tapping. As a result, Mattox advised Sparks of the need for as much as

$20,000 in additional fees. In response, Sparks sent Mattox a letter indicating that he was confused about the sudden increase in fees and that he thought the $5,000 he previously paid represented the entire cost of the legal services. Record at 1242-43.

Several days later, on August 21, 1992, Mattox sent Sparks a written fee agreement, which indicated that the $5,000 was a retainer and that the additional fees were needed due to the complexity of the case and to hire a jury consultant and a private investigator. R. at 994-95. In the letter, Mattox also informed Sparks that he needed to execute a mortgage in favor of the firm on a parcel of his property in order to secure payment of these fees. R. at 994-95. if Sparks did not sign the agreement within twenty-four hours, Mattox indicated the he would file a motion to withdraw from the case. R. at 995. Sparks then signed the agreement, including a note which stated, in pertinent part, as follows: "Accept this as authority to call into play whomever & whatever to assist you at my expense." R. at 1159.

Sometime thereafter, Mattox learned that Sparks had already mortgaged his property to Terry Van Hook, a close friend of Sparks. As a result, on September 9, 1992, a day before the trial, Mattox's associate, Derrick Wilson, went to the jail and gave Sparks a promissory note and mortgage to execute in favor of the firm. Although Sparks initially refused, he signed the note and mortgage after Wilson informed him that Mr. Mattox would withdraw as his counsel if he did not sign the documents. Around the same time, Mattox entered into an agreement with Van Hook to subordinate her mortgage on the property to the firms' mortgage.

The next day, Sparks entered into a plea agreement with the State. Pursuant to the terms of the agreement, Sparks pled guilty to child

molesting as a class D felony on which the trial court entered judgment as a class A misdemeanor.

Over the next year, Sparks received numerous monthly statements from Mattox, all of which indicated that he owed the firm $20,823 in legal fees and expenses. After Sparks repeatedly failed to pay this amount, Mattox filed a complaint against him to recover the fees and enforce the promissory note and mortgage. Mattox also named Van Hook as a defendant, claiming that the firm's security interest in the property was superior to Van Hook's mortgage. In response, Sparks filed a counterclaim against Mattox, alleging that he was entitled to damages because the promissory note and mortgage were entered into under duress and Mattox breached the contract for representation by charging more that $5,000. On April 8, 1994, Mattox filed a motion for partial summary judgment, arguing that Sparks' counterclaim should be dismissed because duress was not a claim, Sparks failed to prove duress and he did not suffer any damages. Following a hearing, the trial court granted Mattox's motion for partial summary judgment and dismissed Sparks' counterclaim.

Thereafter, in December of 1996, Mattox's claims were tried before the bench. During the trial, Sparks argued that the $5,000 fee he paid to Mattox was for the full cost of the representation. He also argued that the fee agreement, mortgage and promissory note should be set aside because he signed the documents under duress. On January 23, 1997, the trial court entered findings of fact and conclusions of law, determining that the mortgage and promissory note should be set aside because they were acquired under duress and that Mattox did not have standing to challenge the mortgage executed in favor of Van Hook. The court also concluded, however, that Mattox was entitled to $16,496.14 plus post-judgment interest under a theory of

quantum meruit. This appeal followed. Additional facts will be supplied as necessary.

DISCUSSION AND DECISION

I. Counterclaim

We first address Sparks' contention that the trial court erred by dismissing his counterclaim. Although somewhat unclear, Sparks appears to argue that he had a right to assert a claim of duress "by (an) affirmative suit in equity," rather than as a defense to Mattox's claim. Appellant's Brief at 9. Therefore, he contends that the trial court was precluded from dismissing his counterclaim.

Even assuming that the trial court erred by dismissing Spark's counterclaim, we fail to see how he was prejudiced. Although sparks was not able to present a separate claim, he was permitted to defend against Mattox's attempt to enforce the agreement and mortgage on the grounds of duress. Considering that sparks was given an opportunity to present evidence of duress and that the trial court set aside the written agreement, promissory note and mortgage on this basis, we cannot conclude that he was prejudiced by the dismissal of his counterclaim. Thus, we find no error.

II. Quantum Meruit

Sparks also contends that the trial court erred by granting judgment in favor of Mattox on the grounds of quantum meruit. Specifically, he argues that a party may only be awarded quantum meruit relief if he or she has clean hands. Because the trial court specifically found that Mattox improperly forced him to execute the mortgage and promissory note, Sparks argues that Mattox is prohibited from recovering under this equitable remedy.

Initially, we note our standard of review. When the trial court has entered findings on its own motion, as here, the specific findings control only as to the issues they cover, and the general judgment controls as to the issues upon which the court has not made findings. Ford v. Peoples Trust and Savings Bank, 651 N.E.2d 1193, 1194 (Ind. Ct. App. 1995), trans. denied. The specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence. Id. A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it. In the Matter of M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996) trans. denied. A judgment is clearly erroneous when it is not supported by the findings of fact or the conclusions relying on those findings. Estate of Reasor v. Putnam County, 635 N.E.2d 153, 158 (Ind. 1994). In reviewing the trial court's findings, we neither reweigh the evidence nor judge the credibility of the witnesses; rather, we consider only the evidence and reasonable inferences drawn therefrom which support the verdict. Coffin v. Hollar, 626 N.E.2d 586, 589 (Ind. Ct. App. 1993).

In support of his contention that the trial court erred in awarding Mattox fees on the basis of quantum meruit, Sparks directs our attention to this court's decision in Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989 (Ind. Ct. App. 1983). In Briggs, an attorney, who had failed to bill an elderly client for services over a prolonged period of time, attempted to recover fees for his past services by having this client pay him a significant portion of her estate upon her death. Id. at 994-95. After the trial court concluded that the attorney was prohibited from collecting under this agreement because it was procured through undue influence, the attorney argued that he was entitled to the fees under a theory of quantum meruit. Id. at

BEST AVA

1004. The trial court rejected his argument and this court affirmed the decision on appeal. Initially, we noted the attorney never made a contemporaneous request for payment or entered into an oral agreement with his client for his services, supporting an inference that these minor legal services were rendered gratuitously. Id. at 1002-04. We then noted that "in order to gain relief in equity, one must have clean hands." Id. Because the attorney had obtained the contract for legal services through undue influence, we concluded he was not entitled to equitable relief. Id. Similarly, Sparks argues that Mattox is precluded from recovering under the equitable remedy of quantum meruit. We disagree.

As noted, the attorney's claim for services in Briggs was based on a written agreement procured through undue influence. Other than this invalid written agreement, however, nothing in the evidence indicated that the attorney and client had ever entered into an agreement for fees or that the services were not intended as a gift. In contrast, although the trial court determined that the method in which Mattox attempted to secure its fees was improper, it did not find, and nothing in the evidence suggests, that Sparks originally retained Mattox under duress. In fact, the evidence reveals that Sparks specifically requested that Mattox take over his representation. Further, nothing in the record indicates that Sparks was dissatisfied with Mattox's performance or that he contested Mattox's right to some compensation. Istead, the evidence reveals that Sparks specifically informed Mattox that "I want you to have what you feel this job is worth" and authorized the firm to "call into play whomever & whatever to assist you at my expense." R. at 1159, 1242. Considering that Sparks was not forced into hiring Mattox, we cannot conclude that Briggs precluded the trial court from awarding Mattox fees on the basis of quantum

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meruit.

However, Sparks also argues that, because the parties had entered into an oral agreement with regard to his legal representation, the trial court should not have relied on principles of quantum meruit in determining Mattox's fees. Specifically, he contends that, pursuant to Landis v. Brooks, 637 N.E.2d 1365 (Ind. Ct. App. 1994), trans. denied, a "dispute over the reasonableness of attorney fees must be resolved pursuant to (the) attorney's agreement with (the) client, and not under principles of quantum meruit, if (the) agreement sets forth (the) hourly rate to compensate and if (the) attorney seeks fees based on the number of hours worked." Appellant's Brief at 12.

We note, however, that the evidence in the present case was conflicting with regard to terms of the parties' oral agreement. for example, while Sparks indicated that he believed the $5,000 he paid Mattox represented the total price of the representation, Richard Mattox testified that the $5,000 was a meant to be a retainer and that he and Sparks had discussed payment of an hourly rate. R. at 1242, 1940. Given this testimony, the trial court could have reasonably concluded that the parties never agreed on Mattox's compensation. In such a situation, a trial court am apply the principles of quantum meruit to determine the reasonable value of an attorney's services. See Kizer v. Davis, 174 Ind. App. 559, 369 N.E.2d 439 (Ind. Ct. App. 1977) (quantum meruit principles applied in absence of fee agreement). Therefore, the trial court did not err in applying the principles of quantum meruit to determine Mattox's fees.

Footnote 4 - Sparks also appears to argue that the trial court's award of fees to Mattox was excessive. However, Sparks has failed to present

a cogent argument to support his argument. Thus, this issue is waived. See Humphrey v. State, 680 N.E.2d 836, 842 n.11 (Ind. 1997) (failure to cite authority or to present cogent argument results in waiver on appeal).

III. Sufficiency of Evidence of Duress

Next, we address Mattox's claim that the trial court erred in finding that Sparks executed the fee agreement, mortgage and promissory note under duress. Specifically, Mattox argues that there is nothing in the record indicating that Sparks did not sign the agreement and mortgage documents of his own free will.

As previously stated, when reviewing the trial court's findings, we neither reweigh the evidence nor judge the credibility of the witnesses; rather, we consider only the evidence and reasonable inferences drawn therefrom which support the verdict. Coffin v. Hollar, 626 N.E.2d 586, 589 (Ind. Ct. App. 1993). The trial court's findings will only be set aside if they are clearly erroneous. Ford v. Peoples Trust and Savings Bank, 651 N.E.2d 1193, 1194 (Ind. Ct. App. 1995), trans. denied. A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it. In the Matter of M.B., 666 N.E.2d 73, 76 (Ind. Ct. App.1996), trans. denied.

Under Indian law, duress is defined as "any unlawful threat or coercion used by a person to induce another to act... in a manner he or she would otherwise not." City of Evansville B. Conley, 661 N.E.2d 570, 575 (Ind. Ct. App 1996), trans. denied. In determining whether a contract can be set aside due to duress, the "ultimate fact" to be decided is "whether or not the purported victim was deprived of the free

exercise of his own will." Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276, 283 (Ind. 1983). Mere threats, which fall short of subverting the victim's will, cannot constitute duress. Id. However, a contract made during the existence of the attorney-client relationship is presumed to be a product of undue influence. Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989. 999 (Ind. Ct. App. 1983).

Here, the record reveals that Richard Mattox sent Sparks a written fee agreement three weeks before his scheduled trial date and threatened to file a motion to withdraw from his case if Sparks did not sign the agreement within twenty-four hours. The record also reveals that, on the day before his trial, the firm again threatened to withdraw from the case if Sparks did not execute the mortgage documents. Finally, Stephen Williams, a crisis therapist with LifeSpring Mental Health, testified that Sparks was emotionally troubled and had a loner profile, which may have increased his anxiety and his need to get out of jail as soon as possible. R. at 2086-89, 2097-2100. Although Mattox presented substantial evidence showing that Sparks was capable of understanding the fee agreement and points out that it never filed a motion to withdraw, the trial court was in the best position to weigh this conflicting evidence. Based on the evidence presented at trial and given the presumption of undue influence, the trial court could have reasonably inferred that Sparks was improperly coerced into signing the agreement in order to obtain his release from jail. Thus, we find no error.

IV. Standing

Mattox also contends that the trial court erroneously concluded that the firm did not have standing to challenge the mortgage agreement executed by Sparks in favor of Van Hook. specifically, Mattox argues that, as a creditor

of Sparks, it had standing to contest the validity and priority of Van Hook's mortgage on Spark's property on the grounds that it was fraudulent.

Even assuming that the trial court erroneously concluded that Mattox did not have standing to contest the validity of the Van Hook mortgage, the trial court went on to conclude that the mortgage was not issued or acquired fraudulently. Mattox has failed to address this aspect of the trial court's finding in its brief or argue that the trial court improperly prohibited it from presenting evidence on this issue at trial. As a result, Mattox has waived this issue on appeal. See Humphrey v. State, 680 N.E.2d 836, 842 n.11 (Ind. 1997) (failure to cite authority or present cogent argument results in waiver on appeal). Therefore, even if the trial court's finding on standing was erroneous, Mattox has failed to demonstrate that it was prejudiced by the finding.

V. Priority of Mortgage

Finally, Mattox contends that, even assuming that its mortgage and primissory note were properly set aside, the trial court erred in concluding that Van Hook's mortgage was superior to the firm's claim for legal fees. Specifically, Mattox argues that Van Hook expressly agreed to subordinate her mortgage on Spark's property to the firm's claim for all sttorney fees and additional costs. Therfore, Mattox contends that its claim is superior to Van Hook's mortgage.

We note, however, that because of Mattox's noncompliance with our appellate rules, we are unable to address his contention on the merits Pursuant to Ind. Appellate Rule 2(B), " all opposing parties shall be served with a copy of all papers filed after the appeal is submitted." Here, the record reveals that although Van Hook

did not participate in this appeal, she was named as a defendant by Mattox in the trial court. Therefore, as an opposing party, Van Hook was required to be served with Mattox's appellate brief for purposes of his cross-appeal. Because Mattox failed to do so, Van Hook did not receive notice of Mattox's cross-appeal and, as a result, was unable to respond to Mattox's claim on appeal. Therefore, we refuse to address Mattox's claim on the merits. See Matter of Belanger's Estate, 437 N.E.2d 90, 91 (Ind. Ct. App. 1982) (party's failure to serve all necessary papers upon an opposing party may result in the dismissal of its appeal).

CONCLUSION

In sum, we conclude that Sparks was not prejudiced by the trial court's dismissal of his counterclaim. We also conclude that the trial court did not err by basing its award of attorney fees to Mattox on the principles of quantum meruit or in setting aside the written fee agreement, promissory note and mortgage on the grounds of duress. Finally, we conclude that Mattox waived his claims regarding standing and the priority of its mortgage.

Judgment affirmed.

NAJAM, J., and RILEY, J. concur.

APPENDIX B

IN THE CIRCUIT COURT FOR CLARK COUNTY

STATE OF INDIANA

MATTOX & MATTOX and
NINA S. MILLER
Plaintiffs

VS. CAUSE NO. 10C01-9309-CP473

PAUL SPARKS and
TERRY VAN HOOK
Defendants

This matter came before the Court for trial on Plaintiff's complaint without the intervention of a jury on December 18, 1996 and December 31, 1996, the Court having jurisdiction over the parties and the subject matter of this action. The plaintiffs appeared by counsel, Robert A. Donald, the Defendant Paul Sparks appeared in person and by counsel, Nader G. Shunnarah, and the Defendant Terri Van Hook appeared in person but without counsel. At the conclusion of the trial, the Court took its finding under advisement.

Factual Summary

This case is based upon a dispute regarding the payment of the attorney fees of Mattox & Mattox and expert witness fees of Plaintiff Miller for services rendered by the Plaintiffs to the Defendant Paul Sparks. On May 18, 1992 the Sparks was charged with the offense of Child Molesting, A Class D Felony, in the Clark County Court. On July 1, 1992 Mattox appeared in Court for Sparks. Shortly before July 1, Mattox and Sparks met resulting in Sparks paying Mattox a fee of $5,000.00. There was no written agreement betw3een the parties regarding the terms of representation. On July 1, 1992 Sparks

bail was revoked and he was confined to the Clark County Jail pending Trial. At a pre-trial conference on August 12, 1992, Mattox became aware that the case against Sparks was more complex and at that time mattox advised Sparks of the need for additional attorney fees. In a letter dated August 21, 1992 Mattox advised Sparks that the $5,000.00 previously paid was a retainer, that a cap of $25,000.00 would be place on fees and that it would be necessary to hire a jury consultant, Plaintiff Miller. - The letter was hand-delivered to Sparks by a Mattox representative and Sparks signed the letter in acknowledgment of the arrangement. On September 9, 1992, on day before trial Sparks signed a promissory note and mortgage on his real estate securing the sum of $20,000.00. On that date the Defendant Van Hook signed a mortgage subordination agreement giving priority to the Mattox mortgage over a mortgage she acquired from Sparks on June 18, 1992. On September 10, 1992, the day of trial, the State of Indiana and Sparks with counsel entered into a plea agreement resulting in the entry of judgment of a Class A Misdemeanor with a one year sentence suspended to seventy (70) days time served with costs but no fine. On October 6, 1992 Sparks received a billing from Mattox in the sum of $20,823.00. Miller submitted a billing to Sparks in the sum of $5,428.57.

Issues Summary

Plaintiff Mattox contends that the $5,000.00 fee paid on July 1, 1992 was in the nature of a retainer. Mattox contends that Sparks' written aceptance on the fee confirmation letter of August 21, 1992 was not acquired under duress and that it represent the contract between the parties, and that the promissory note and mortgage executed by sparks on September 9, 1992, the day before trial, in that he was advised that he would not have the services of an attorney unless he eected the

mortgage and promissory note, and therefore, the mortgage and note should be set aside. Sparks further contends that the $5.000.00 fee paid to Mattox on July 1, 1992 was for full representation through trial if necessary.

Plaintiff Mattox also contends that the mortgage given by Sparks to Van Hook was fraudulent and should be set aside.

No specific objection to the fees of Plaintiff were presented by Sparks.

Order

The Court finds and orders as follows.

1. The morgage and promissory note acquired by the Plaintiff Mattox from the Defendant Sparks was acquired under duress and tht the mortgage and promissory note should be and is hereby set aside.

2. The Plaintiffs Mattox and Miller have no standing to challenge the mortgage executed by Sparks in favor ofthe Defendant Van Hook, the mortgage was notissued or acquired fraudulently and Plaintiffs request to set aside said mortgage should be and the same is hereby denied. The said mortgage is hereby declared valid.

3. The Plaintiff Mattox provided legal services to Sparks an should be compensated for services under the theory of quantum meruit through the date prior to the acquisition of the mortgage and promissory note.

4. The plaintiff Mattox & Mattox should be and is hereby granted a judgment against the Defendant Paul Sparks in the sum of $16,496.14 plus post-judgment from the date hereof at the statutory rate.

5. The Plaintiff Nina S. Miller should be and is hereby granted a judgment against the Defendant Paul Sparks in the sum of $5,428.5[illegible] plus post-judgment interest from the date hereof at the statutory rate.

SO ORDERED THIS 23[illegible] AY OF JANUARY, 1997.

"/s Daniel Donahue"
Judge Clark Circuit Court

Copies To:

Nobert A. Donald, Attorney for Plaintiffs
Nader Shunnarah, Attorney for Defendant Sparks
Terri Van Hook

APPENDIX C

STATE OF INDIANA

217 State House
Indianapolis, IN 46204

H. John Okeson

Clerk of the Supreme Court,
Court of Appeals and Tax Court (317) 232-1930
Fax(317) 232-8365

NADER SHUNNARAH

513 S. Fifth St., #2B
Louisville, KY. 40202

Cause Number
10A01-9703-CV-00077
Lower Court Number
10C019309CP473

SPARKS, -V- MATTOX & MATTOX ETAL

You are hereby notified that the COURT OF APPEALS has on this day 4/14/98
APPELLANT'S PETITION FOR REHEARING DENIED.
JOHN T. SHARPNACK, CHIEF JUDGE
KM

WITNESS my name and the seal of said Court,
this 14th day of APRIL, 1998

"s/H. John Okeson"
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX D

STATE OF INDIANA

217 State House
Indianapolis, IN 46204

H. John Okeson

Clerk of the Supreme Court,
Court of Appeals and Tax Court (317) 232-1930
Fax(317) 232-8365

NADER SHUNNARAH

513 S. Fifth St., #2B
Louisville, KY. 40202

Cause Number
10A01-9703-CV-00077
Lower Court Number
10C019309CP473

SPARKS, -V- MATTOX & MATTOX ETAL

You are hereby notified that the SUPREME COURT has on this day 9/11/98

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. KM

WITNESS my name and the seal of said Court,
this 11th day of SEPTEMBER, 1998
"s/H. John Okeson"
Clerk Supreme Court, Court of Appeals and Tax Court